UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEWART L. UDALL, Secretary of)
the Interior, and the State of)
Alaska,)
)
Appellant,)
)
vs.) No. 21,629
)
ANDREW J. KALERAK, et al,)
)
Appellee.)
)

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PETITION FOR REHEARING AND SUGGESTION OF APPROPRIATENESS OF REHEARING EN BANC

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TABLE OF AUTHORITIES

CASES CITED:

OTHER AUTHORITIES:

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Appellees respectfully petition this Court for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure and pursuant to Rule 35 thereof respectfully suggest that such rehearing be by the Court en banc. This is no mere isolated dispute between A and B over the right to Blackacre, but affects the entire system of distribution of public lands. We submit that this Court's decision jeopardizes the administration of the public land laws generally by substituting elusive questions of intent for the straightforward procedural requirements of regulations promulgated by the Secretary. While the immediate result is to approve the Secretary's action in this case, the decision undermines the efficacy of his regulations and contravenes the settled principle of administrative law

that as long as they are in effect such regulations bind the Secretary as well as the public.

ARGUMENT

This petition is addressed exclusively to the Court's holding that the Secretary properly treated Alaska's amendments of its original application for selection as a reapplication for selection of the lands described in the original application. The critical language of this Court's opinion is as follows:

> "In our opinion the district court erred in failing to accept the second of these rulings. While Alaska's four amendments of the original application did not include the land descriptions set out in the original application, the state intended such amendments as a reassertion of the original land descriptions as well as applications for the selection of additional lands. This is indicated by the facts that: (1) the new lands were brought in by amendment of the original application (referring thereto by number), rather than by new applications, (2) the amendments referred to 'additional open lands,' indicating Alaska's view that it wished to select the lands described in the original application, and add thereto, and (3) the notice published after the four amendments had been filed, and before any of the plaintiffs tendered their claims for filing, named all lands described in the original application as well as the four amendments.
>
> In view of Alaska's intent in this regard, and the lack of prejudice to plaintiffs inasmuch as they had notice of Alaska's claim to all such lands before they tendered their claims, the Secretary did not abuse his discretion in accepting the amendments as a timely reassertion of Alaska's original application." (Slip op. pp. 3-4).

This Court's view of the amendments attributes to Alaska the intent to select on five different occasions the land described in the January 8 filing. We submit that this interpretation is unsound.

The amendments did not constitute new selections of the land described in the invalid January 8 filing; they merely added new land thereto. This is clear from the language of the subsequent filings which do not even describe the land selected on January 8, but simply refer to the prior application in order to identify the prior document to which an amendment was being made.[1/] Our view is further confirmed by the notice published by Alaska and on which this Court placed special reliance. That notice, published after the 90-day period, at a time when under the statute and regulations the lands in question were again "subject to the operation of the public land laws generally"[2/] declared that pursuant to Section 6(b) of the Statehood Act, the State "on January 8, 1963, and subsequent amendments thereto, filed application Anchorage Serial 058566, for certain public lands * * * more particularly described as follows. * * *" The notice makes no claim that land was selected in the period between April 8 and July 8, 1966, and no person who read it could

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[1/] Since none of the lands involved in this litigation were the subject of the amendments, it need not be considered whether a selection within the open period which took the form of an amendment of a claim made in the withdrawal period would be valid.

[2/] Public Land Order 3022, 28 F.R. 3661, par. 5.

determine that the land had been selected in the open period even if the Secretary's relation-back theory were legally valid. For aught that appears in the notice all the amendments could have been just as premature as the original and invalid as the original selection of January 8 referred to therein.[3/] If intention is to be the test -- and we show below that it cannot be -- all objective evidence record dispels this Court's conclusion that it was intended by the amendments (and the reference therein to the earlier selection) to make a new selection of the lands originally invalidly claimed. But questions of interpretation aside, the amendments cannot be treated as a new selection, because the Secretary's own regulations forbid giving it such effect.

43 C.F.R. 1821.6-6 (formerly 43 C.F.R. 104.13)

provides as follows:

> "Where entries, selections, or locations are improperly allowed, as where the lands are not subject to such entries, selections or locations, amendments will not be allowed, because such claims, being invalid, should be cancelled, and upon cancellation thereof a new entry, selection or location may be allowed as though the former had never been made." (Emphasis added).

[3/] For the same reason, the notice could not vitiate the prejudice to appellants. It apprised them only that Alaska had made a claim, but during a period when the lands were not open for selection. Thus plaintiffs had every reason to believe that no valid prior selection had been made and that the land was for settlement when they tendered their claim.

The regulation thus makes crystal clear that an illegal entry cannot be revived and validated by amendment but must be cancelled, and upon cancellation a new entry may be allowed.

This regulation, like the others on which we rely, was promulgated pursuant to authority granted by statute and hence has the force of law. "That it binds him [the Secretary] as well as others while it is in effect is not doubted." Chapman v. Sheridan-Wyoming Coal Company, 338 U.S. 621, 629. The Sheridan-Wyoming Coal case thus anticipated -- and applied to regulations of the same character as are involved in this case -- what is now a firmly settled principle of administrative law: "that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature." Service v. Dulles, 354 U.S. 363, 372, following Accardi v. Shaughnessy, 347 U.S. 260. See also Vitarelli v. Seaton, 359 U.S. 535; Williams v. Zuckert, 371 U.S. 531, 372 U.S. 765. That principle is wholly inconsistent with this Court's holding that the Secretary's action in this case in accepting the amendments as a timely reassertion of Alaska's original application can be sustained as an exercise of his "discretion." The Secretary had discretion to determine the effect which is to be given amendments to applications; and §6(g) of the Alaska Statehood Act expressly gave the Secretary discretion to formulate the procedures

by which Alaska would make selections thereunder. But having exercised his discretion to promulgate these rules, he is not free to waive them, although he is free to revise them by promulgating new ones.

This Court's decision did not rely on either the Alaska Statehood Act or the regulations promulgated thereunder to support the Secretary's decision. There is nothing in either which authorizes the Secretary to give effect to Alaska's "intent" and thereby to convert a right to select lands which are "unreserved at the time of selection" into a general power to select reserved lands and to validate such selection by subsequent amendment. Similarly, there is, of course, nothing in either the statute or the regulations which permits the procedures prescribed by regulation to be waived because of any intent of the claimant. Those regulations prescribe in considerable detail the procedures which must be followed for any selection of land under this Act; other regulations similarly prescribe the manner in which claims are to be made under other public land laws. Intent is irrelevant under all of them.

That long-standing practice has the soundest possible justification. It is essential to fair and efficient administration of the public land laws that the validity of claims be determined by clear and objective criteria. To give scope to the subjective factor of intent would continually invite disputes

among claimants and would require costly hearings to resolve them. As with title registration, the key to successful and impartial administration is the adoption of clear procedural rules, with strict adherence thereto. Intent has no more place in determining the validity of a claim under the public land laws than in determining whether a deed has been properly recorded.

By introducing the factor of intent in this case, the Court has taken an unprecedented step which can only embarrass the administration of the public land laws. For that reason, and because the decision herein is inconsistent with the cited holdings of the Supreme Court, we urge that this petition for rehearing be granted.

Respectfully submitted,

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